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ARTICLE

Receivership of Foreign-based Companies: Scottish Government Acts

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Introduction

In the autumn of last year the Scottish Government issued a consultation paper regarding the scope of receivership in Scotland. This article follows up an article published in relation to that consultation in 2010 International Corporate Rescue 289.

The Scottish Government consultation related, in particular, to concerns regarding the linkage of receivership under Scots law to jurisdiction of the Scottish courts to wind a company up – and the restriction of that winding up jurisdiction following the coming into force in May 2002 of the European insolvency regulation (Council Regulation (EC) No. 1346/2000, the 'EUIR'). The concern was expressed that, for example, it ceased to be possible from May 2002 to appoint a receiver in Scotland in relation to the Scottish assets of an Irish-based investment company with no 'establishment' (for the purposes of the EUIR) in Scotland – when the changes introduced by the EUIR were only intended to restrict winding up and administration in Scotland in these circumstances.

Taking account of responses received to its consultation, the Scottish Government has reformed the law here, through the Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140, the 'Amendment Regulations'), which came into force from 17 March 2011. The Amendment Regulations amend section 51 of the Insolvency Act 1986 ('Section 51') in order to permit a receiver to be appointed to property situated in Scotland of a company which the Scottish courts cannot wind up, but relative to which another EU member state has jurisdiction to open insolvency proceedings under the EUIR (a 'Non-UK EU-based Company').

Section 51

Section 51(1) has been amended by the Regulations to read as follows:

> 'It is competent under the law of Scotland for the holder of a floating charge over all or any part of the property (including uncalled capital), which may from time to time be comprised in the property and undertaking of an incorporated company (whether a company registered under the Companies Act 2006 or not)
>
> (a) which the Court of Session has jurisdiction to wind up; or
>
> (b) where paragraph (a) does not apply, in respect of which a court of a member state other than the United Kingdom has under the EU Regulation jurisdiction to open insolvency proceedings,
>
> to appoint a receiver to such part of the property of the company as is subject to the charge.'

The Amendment Regulations inserted paragraph (b) into section 51(1), along with cross-definition of 'court' and 'insolvency proceedings' in paragraph (b) to the EUIR.

Property situated in Scotland

Following the suggestion of some respondents to the Scottish Government consultation, the Amendment Regulations also insert the following new subsection (2ZA) into section 51:

> 'But, in relation to a company mentioned in subsection (1)(b), a receiver may be appointed ... only in respect of property situated in Scotland.'

Accordingly, it has been possible from 17 March to appoint a receiver under Scots law in relation to the property situated in Scotland of the Irish-based investment company mentioned above under a floating charge granted by that company.

Two specific points arise out of the restriction of such an appointment to property situated in Scotland. The first is that it is now possible under Scots law to appoint a receiver to part only of the assets charged by a floating charge – the other main issue to which the Scottish Government consultation related. This means that an all assets charge granted by our Irish-based investment company with assets in Scotland and Ireland can be enforced over Scottish assets by receivership but that such a charge granted over the same geographical spread of assets by a Scottish-based company could not be enforced over its Scottish assets by receivership – as a

receiver would have to be appointed in respect of all of its assets and such a receiver would be an administrative receiver, the appointment of whom would normally be prohibited under section 72A of the Insolvency Act 1986.

The second point relates to the meaning of 'situated in Scotland'. The meaning of this expression is clear regarding land and as regards tangible moveables presumably means those physically located in Scotland at the time of appointment of the receiver. It is much less clear when intangibles may be considered 'situated in Scotland' and various arguments can be made in various situations regarding various types of intangible asset – in favour of the location of a debtor, creditor, document or register or the law expressed to govern an intangible or a transaction relating thereto. Floating charge holders and receivers are thus likely to be faced with a number of uncertainties in this context when dealing with intangibles which may be Scottish or with intangibles linked closely to land and tangible movables which are more clearly Scottish.

Part assets receivership

The reference in section 51(1) above to appointment of a receiver to 'such part of the property of the company as is subject to the charge' is generally thought to prevent a receiver being appointed only to a limited part of the assets charged by a floating charge – such as to a part of the assets charged by an all assets floating charge. This means that the holder of an all assets floating charge cannot generally appoint a receiver only to, say, a limited group of assets or a separable business division which would realise enough to clear the secured debt – but would instead have to seek administration or liquidation of the company as a whole, potentially destroying the value to other stakeholders of the rest of the company's businesses and assets. While, as indicated above, the Amendment Regulations have introduced part assets receivership relative to Scottish assets of Non-UK EU-based Companies, the Scottish Government consultation related also to this issue in its application to other companies and to other groups of assets. It is understood that the Scottish Government is still considering whether or not to pursue more general changes in relation to part assets receivership.

Conclusions

While some problems may arise in relation to the restriction of receivership of Non-UK EU-based Companies to property situated in Scotland, the extension of receivership to such companies by the Amendment Regulations is to be welcomed. It is suggested that the Scottish Government should continue with its reforms and now seek to take forward the more general change regarding part assets receivership on which it consulted.

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